UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.644
20 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 644th MEETING

Held at Headquarters, New York,
on Tuesday, 9 June 1998 at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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98-80785 (E)

The meeting was called to order at 10.15 a.m.

ELECTRONIC COMMERCE (continued) (A/CN.9/446 and A/CN.9/450)

Article 5 bis. Incorporation by reference (A/CN.9/450)

1. Ms. ALLEN (United Kingdom) said that although her delegation would have preferred to go in a different direction with regard to the article on incorporation by reference, it would be prepared to accept the text proposed by the secretariat (A/CN.9/450, para. 7), with the proviso that the secretariat would reconsider the use of the word "purported", as requested by the representative of Australia at the previous meeting.

2. Mr. MARADIAGA (Honduras) said that his delegation would also accept the drafting in paragraph 7 because of the importance of concluding the deliberations and making the new text of the Model Law on Electronic Commerce available.

3. Mr. CHOUKRI (Observer for Morocco) said that his delegation would prefer to find a positive formulation for the concept contained in article 5 bis and proposed the following wording: "Incorporation by reference shall have the same validity and enforceability as data messages in the information message."

4. Mr. SORIEUL (International Trade Law Branch) said that a positive formulation would of course be preferable, but that the Working Group had reluctantly decided that only a negative formulation would accurately convey the desired meaning. He doubted that it would be possible to come up with an acceptable positive drafting without further study.

5. Mr. BURMAN (United States of America) said that his delegation's views echoed those of the United Kingdom. Although some of the alternative drafting proposed was interesting, the bulk of support was clearly behind the drafting from the secretariat. It was important to conclude work on the Model Law at the current session, and there were no new issues to be discussed, all the possibilities had been thoroughly covered. Perhaps it could be reflected in the guide to enactment that other systems of mandatory rules on incorporation by reference placed the same obligation on a party to make reasonable efforts to ascertain the text of the information incorporated by reference, so that a party could not avoid its obligations simply by asserting that it did not have that knowledge, while having made no attempt to do so.

6. Mr. SORIEUL (International Trade Law Branch), noting that the Commission had reached the final adoption stage for the text in question, said that there would be no opportunity to incorporate suggestions into a new version of the document. Unless there were specific proposals, the matter would have to be referred to the Working Group again.

7. Mr. KONKAOLA (Finland) said that his delegation supported the version of article 5 bis proposed by the secretariat. He wondered if adding a provision to the Model Law could have the effect of weakening it, however, and whether the

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aim of that provision could be achieved through dissemination of information to Governments instead.

8. Mr. SORIEUL (International Trade Law Branch) said that the Model Law on Electronic Commerce had always been viewed as slightly different in form from the others in that it was open-ended and that updated versions had been issued. Thus adding an article would not violate the general concept of that text, but it would make it necessary to issue an addendum to the 1996 text of the Model Law containing the 1998 amended version. He was not sure how article 5 bis would be incorporated into an update.

9. Ms. SABO (Observer for Canada) said that her delegation did not see the need for the article on incorporation by reference, although it was clear that other States did. The proposals raised policy questions, and her delegation would prefer to see it made clear that the same set of rules governed incorporation by reference for electronic transactions as for paper-based transactions. The version proposed by the secretariat seemed to do the job, if it was understood that "solely" meant that other rules for paper-based transactions applied. She commended the secretariat for its work in preparing the addition to the guide to enactment contained in annex II of A/CN.9/450, and suggested that the text of the guide might reflect policy questions more clearly.

10. On the question of how the text should be presented, she would be interested to hear the views of the secretariat and other delegations on possible titles and ways of publicizing it.

11. Mr. RENGER (Germany) said that, like the representative of Canada, he was not convinced of the benefits of such a provision, as it could be misleading. Therefore, although he did not object, he could not actively support the proposal. Consensus was required in contract law, and he did not believe that it was absolutely clear what kinds of information were included and whether the other party was aware of that information.

12. As for the presentation of the article, he recalled that other model laws had been submitted to the General Assembly in the form of a resolution, but he wondered whether that article warranted the drafting of a separate resolution.

13. Mr. HERRMANN (Secretary of the Commission) said that the article would be incorporated in a paragraph of the resolution on the work of the Commission.

14. Ms. MUSOLINO (Australia) said that her delegation wished to propose two alternative versions of the text which might improve its clarity. The first alternative would read:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect but is referred to within that data message as forming part of that message."

The second alternative was:

> "If a data message refers to information as forming part of it, but that information is not fully contained in that data message, then the information so referred to shall not be denied legal effect, validity or enforceability solely on the ground that it is not fully stated in the data message."

15. Mr. MARKUS (Observer for Switzerland) said that his delegation preferred the wording proposed by the secretariat. It should not be forgotten that the provision was meant merely as a non-discrimination rule. Reference by an electronic text to an electronic text should not be subject to discrimination under the law simply because it was so incorporated. The secretariat's proposal was of the sort found in many legal texts: formulated simply, with a high level of abstraction. In his view, the other proposals tended to be too complicated or too descriptive and employed legal notions which went further than the meaning sought by the Commission.

16. Mr. ENOUGA (Cameroon) said that his delegation preferred a more positive formulation: "The information is valid, enforceable and gives rise to legal effects despite its incorporation by reference in a data message."

17. Mr. BURMAN (United States of America) said that his delegation endorsed the views expressed by the Observer for Switzerland. The secretariat's proposal had been carefully and clearly drafted to reflect an extended discussion in the Working Group, which was made up of persons actively engaged in that sphere of commercial law. Members should therefore hesitate before attempting to redraft from the floor. It had been understood from the outset that there would be additions to the Model Law on Electronic Commerce; the secretariat had pointed out that some might merit special resolutions. In his delegation's view, however, the provision under consideration did not, and should simply be incorporated in the Commission's annual report to the Sixth Committee.

18. Mr. ENIE (Observer for Gabon) agreed with the representative of the United States of America that the Commission should either adopt or reject the provision; it was not appropriate to redraft it at the current stage. The second proposal put forward by the representative of Australia was not substantially different from that of the Working Group; it was simply longer and more descriptive. His delegation preferred the secretariat's proposal: it was flexible, logical, and amenable to interpretation by the various legal systems.

19. Mr. GILL (India) said that although several good proposals had been put forward by delegations, he, too, supported the draft provision formulated by the secretariat: it was self-contained, simple and well-drafted. He also agreed that the new article should merely be mentioned in a general resolution and did not merit a special resolution of its own.

20. Ms. NIKANJAM (Islamic Republic of Iran) said that although her delegation was fully satisfied with the wording proposed by the secretariat, Australia's first proposal was also acceptable.

21. Mr. SORIEUL (International Trade Law Branch) said that, to eliminate ambiguity, a minor revision should be made to the secretariat's version of draft provision 5 bis: the word "purported" should be changed to "purporting".

22. He thanked the Observer for Canada for her suggestions concerning the text of annex II, which could be adopted subject to those revisions. The Working Group's discussion, held over years, on the matter of incorporation by reference had shown that agreement could not be reached. It had been impossible to formulate a real law, and the Working Group had at last settled for the establishment of a non-discrimination rule which provided only that the same rule should apply, whatever the domestic legal framework, to incorporations by reference whether contained in a data message or in a conventional text. That was indeed a minor accomplishment; there was no cause either to change the title of the law or to issue a new booklet. The secretariat planned to include the new article in an annex to the existing document, and mention would be made of its adoption only in a general resolution to be reviewed by the Sixth Committee.

23. The CHAIRMAN noted that most delegations, even those which had submitted other proposals, seemed to prefer draft provision 5 bis as formulated by the secretariat and agreed that it should be mentioned in a General Assembly resolution. If he heard no objection, he would take it that the members wished to adopt new article 5 bis, as orally revised, as well as the related material that was to be inserted in the Guide to Enactment of the Model Law on Electronic Commerce, subject to the modifications discussed.

24. It was so decided.

RECEIVABLES FINANCING: ASSIGNMENT OF RECEIVABLES (A/CN.9/445 and 447)

25. The CHAIRMAN drew attention to the reports of the Working Group on International Contract Practices on the work of its twenty-seventh and twenty-eighth sessions, held in Vienna in 1997 and New York in 1998 (A/CN.9/445 and A/CN.9/447), at which the Working Group had reviewed the revised articles of a draft Convention on Assignment in Receivables Financing.

26. Mr. BAZINAS (International Trade Law Branch) said that, at its twenty-eighth session the Working Group on International Contract Practices had adopted, in substance, those provisions of the draft Convention on Assignment in Receivables Financing which dealt with the relationship between the assignor and the assignee as well as those which dealt with debtor protection. It had also made substantial progress on a number of other matters, including the validity of assignments of future receivables, of receivables not individually identified (bulk assignments) and of those which were concluded in violation of or despite an anti-assignment clause contained in the contract under which the assigned receivables arose. A number of issues remained to be resolved, among them contractual receivables, tort receivables, deposit accounts, tax receivables and insurance receivables.

27. A central concern had been the matter of public policy with regard to debtor protection. The Working Group had determined that the draft Convention should introduce a threshold for the protection of debtors that was high enough

to meet the concerns of all States and make it unnecessary for them to fall back on general public policy reservations to ensure adequate protection.

28. Another major issue was that of conflicts of priority among several claimants of the same receivables, either among several assignees of the same receivables from the same assignor or between assignees and creditors of the assignor or the insolvency administrator. The Working Group had agreed on a bifurcated approach which would incorporate two substantive law priority rules, one based on the time of assignment and one on the time of registration. Under that approach, States adopting the draft Convention could choose between them. A private international law priority rule would also refer conflicts of priority to the law of the assignor's location.

29. The Hague Conference on International Private Law, in cooperation with the Commission secretariat, had convened a meeting of experts to discuss issues of private international law as related to assignment. That group had concluded, inter alia, that the private international law rule dealing with priority based on the assignor's location was one which could function in the context of the draft Convention, provided that its application was limited to the transactions falling within its scope.

30. It should also be mentioned that the Working Group had attracted the attention of the international trade and finance community, since its work was likely to increase access to lower-cost credit in many countries where the only asset parties could offer as security for credit were the receivables arising from the sale or other use of their products.

The meeting was suspended at 11.20 a.m. and resumed at 11.55 a.m.

31. Mr. BURMAN (United States of America) said that the draft Convention on Assignment in Receivables Financing could significantly increase the availability of commercial credits to many markets. The Working Group on International Contract Practices had made a great deal of progress in drafting key provisions on the assignability of future receivables, bulk assignments and treatment of non-assignment clauses. At its next session, the Working Group should carefully consider limiting the scope of the draft Convention because if the draft Convention was expanded to cover a variety of other receivables, it would involve almost every commercial sector in every country.

32. His delegation commended the way in which the Working Group had dealt with the treatment of priority rules. The best approach seemed to be a combination of options. His delegation welcomed the recent discussions that had been held under the auspices of the Commission and the Hague Conference on Private International Law; further cooperation between the Commission and the Conference would help provide practical solutions to the legal issues involved in assignment in receivables financing.

33. Ms. FOLLIOT (France) said that while her delegation approved the general direction taken by the Working Group on International Contract Practices, a number of technical aspects still had to be discussed or considered in greater depth. France believed that the draft articles should take the form of a convention. Work on the draft Convention should be completed by the year 2000.

Her delegation had been pleased to learn of the joint work that had been carried out by the Commission and the Hague Conference on International Private Law; the report on that work should be submitted for consideration at the next session of the Working Group.

34. Ms. SABO (Observer for Canada) said that her delegation had noted the high level of expertise and participation of delegations of both member and observer States. The representatives of international organizations, such as the European Federation of National Factoring Associations, the Commercial Finance Association and Factors Chain International, had made important contributions to the deliberations of the Working Group. While agreement had been achieved on some fundamental issues, much work remained to be done. The holding of two more sessions of the Working Group would help to reach a consensus on a number of very difficult issues still to be considered. If a solid consensus could be ensured only by restricting the scope of the draft Convention, her delegation would favour that approach.

35. With respect to the options set out in the annex to document A/CN.9/447, her delegation was in favour of a registry system, since that was the system used in Canada. However, her delegation recognized that, at the current stage, such an approach posed virtually insurmountable problems for many States. The conflicts rule by way of default should be workable. Her delegation looked forward to working with the secretariat and other States interested in the options approach.

36. Canada welcomed the successful cooperation between the Commission and the Hague Conference on Private International Law. Such mutually advantageous cooperation should continue. Her delegation looked forward to studying the report on the conclusions of the meeting of experts at the next session of the Working Group.

37. Ms. ALLEN (United Kingdom) said that her delegation welcomed the secretariat's suggestion as to how priority among competing claimants to an assigned receivable should be determined. The options approach was a pragmatic answer to the divergent views that had been expressed in the Working Group. Like the representative of the United States, she believed that the scope of the draft Convention should be relatively modest and should not attempt to encompass such issues as non-contractual receivables.

38. Mr. GILL (India) said that, while the Working Group on International Contract Practices had reached agreement in principle on several important issues, it still had to consider the very important question of the effects of assignments on third parties. The Working Group should closely examine the idea that registration should serve as the basis for determining the time of assignment. Those and other issues should be discussed by the Working Group and the Commission at their forthcoming sessions with a view to finding an acceptable but efficient system of uniform law on assignment in receivables financing. His delegation supported the secretariat's proposal to hold two further sessions of the Working Group in order to complete work on the draft Convention.

39. His delegation believed that the final form of the draft should be a convention. The purpose of the rules of private international law was to fill in the gaps, if any, in the substantive rules laid down in the future convention. Statutory rules of States parties would be given primacy with regard to the conflict of priority between the insolvency administrator and the assignees.

40. Mr. MARKUS (Observer for Switzerland) said that his delegation regretted that the Working Group had not been able to agree on uniform rules with regard to the important question of priority, since uniform rules would facilitate international trade. With regard to the form of assignment, the Working Group should find a solution that was acceptable to all.

41. With regard to territorial scope, proposals had been made to find a solution similar to the one contained in the United Nations Convention on Contracts for the International Sales of Goods (the Vienna Sales Convention). His delegation wished to point out that such a solution would be very difficult, since the assignment of proceeds dealt with a three-party relationship and not the two-party relationship as in the Vienna Sales Convention. It might therefore be necessary to consider other solutions that did not use the method of the applicable-law rule.

42. Finally, his delegation commended the fruitful cooperation between the Commission and the Hague Conference on Private International Law. Such cooperation would enable the two bodies to make use of each other's expertise.

43. Mr. OLIVENCIA RUIZ (Spain) said that his delegation attached great importance to the deliberations of the Working Group and commended the progress that it had achieved in preparing the text of the draft Convention. The Working Group at its next session should finalize the text so that the Commission could consider it at its thirty-second session.

44. Mr. KLEBER (Observer for Venezuela) said that his delegation considered that the form of a convention would be the best way of giving effect to the draft provisions, since a convention would take account of the context and features of the national legislation of all countries, thus ensuring the uniformity of international trade law.

45. Mr. CHOUKRI (Observer for Morocco) welcomed the draft prepared by the secretariat and expressed the hope that its completion would alleviate the conflict-of-law problems arising in a number of countries. Assignment in receivables financing was among the most important civil law questions, and the novel solutions proposed in the draft text were as yet unknown in many countries, including his own. It was common practice for assignment to take place through formal notification to the assignee and his acceptance in writing. The proposal to include all information relating to the assignment would be very helpful, especially at the international level. He hoped that the secretariat would adhere to its present approach and opt for a non-mandatory system, bearing in mind the civil liability that could be incurred if mistakes were made.

46. The title of the topic had no real meaning in Arabic, and he suggested amending it to read: "Assigning rights in receivables financing".

47. The CHAIRMAN suggested that the Commission should take note with appreciation of the work of the Working Group as reflected in its two reports.

It was so decided.

The discussion covered in the summary record ended at 12.35 p.m.